SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 660

In the Matter of

JOHN ELWOOD DENNETT

Petitioner

BRIEF OF RESPONDENTS BENEFICIAL LIFE INSURANCE COMPANY, BEEHIVE STATE BANK, WALKER BANK & TRUST COMPANY, PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, FRED G. BIESINGER AND A. P. NEILSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS DELIVERED IN THE COURTS BELOW

The United States District Court for the District of Utah did not write a formal opinion. However, the Court delivered a substantial oral opinion from the bench on November 4, 1967, as to the reasons for adjudging John Elwood Dennett, the petitioner, bankrupt. The transcript of that hearing is a part of the record. (R 153) The United States

Court of Appeals for the Tenth Circuit filed its per curian opinion on July 15, 1968. The opinion is not published, but a copy of the opinion is included in the record. (R 8.....).

JURISDICTION

The jurisdiction of the Court was invoked by petitioner under 28 U.S.C. § 1254(1) and 11 U.S.C. § 24C. The petitioner has alleged that certiorari should be granted pursuant to Rule 19(1) (b) of the Rules of the Supreme Court of the United States in that the United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U. S. CONST. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

§1 (11 U.S.C. §1)

The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: . . .

(2) "Adjudication" shall mean a determination, whether by decree or by operation of law, that a person is a bankrupt. . .

(4) "Bankrupt" shall include a person against whom an involuntary petition or an application to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; . . .

(11) "Creditor" shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; . . .

(14) "Debt" shall include any debt, demand, or claim provable in bankruptcy; . . .

(28) "Secured Creditor" shall include a creditor who has a security for his debt upon the property of the bankrupt of a nature to be assignable under this Act or who owns such a debt for which some endorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets; . . .

(32) "Wage earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year.

§4 (11 U.S.C. §22)

a. Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt.

§7 (11 U.S.C. §25)

a. The bankrupt shall . . . (8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their residences or places of business, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated, or disputed: . . .

§18 (11 U.S.C. §41)

f. The filing of a voluntary petition under Chapter I to VII of this Act, other than a petition filed in behalf of a partnership by less than all of the partners, shall operate as an adjudication with the same force and effect as a decree of adjudication.

§59 (11 U.S.C. §95)

a. Any qualified person may file a petition to be adjudged a voluntary bankrupt.

§401 (11 U.S.C. §801)

The provision of this chapter shall apply exclusively to proceedings under this chapter.

§402 (11 U.S.C. §802).

The provisions of chapters I to VII, inclusive, of this Act shall ,insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply

to proceedings under this chapter: *Provided, however,* That subdivision of section 57 shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors", and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 422 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 421 or 422 of this Act.

§406 (11 U.S.C. §806)

For the purposes of this chapter, unless inconsistent with the context—

(1) "arrangement" shall mean any plan which has for its primary purpose the alteration or modification of the rights of creditors or of any class of them, holding debts secured by real property or a chattel real of which the debtor is the legal or equitable owner:

(2) "claims" shall include all claims of whatever character, against a debtor or his property, whether or not such claims are provable under section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent; . . .

(5) "creditors" shall mean the holders of claims; . . .

(7) "debts" shall include all claims. . .

§412 (11 U.S.C. §812)

Where not inconsistent with the provisions of this chapter the jurisdiction, powers, and duties of the court

shall be the same—

(1) where a petition is filed under section 421 of this Act, as if a decree of adjudication had been entered in the bankruptcy proceeding at the time the petition under this chapter was filed; and

(2) where a petition is filed under section 422 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.

§415 (11 U.S.C. §815)

Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, the time within which, the persons to whom, and the form and manner in which the notice shall be given. Any notice to be given under this chapter may be combined, whenever feasible, with any other notice or notices under this chapter.

§421 (11 U.S.C. §821)

A debtor may file a petition under this chapter in a pending bankruptcy proceeding before his adjudication.

§422 (11 U.S.C. §822)

If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication.

§424 (11 U.S.C. §824)

The petition shall be accompanied by—

(1) a statement of the executory contracts of the

debtor files with the petition a list of his creditors and their addresses and a summary of his assets and liabilities, the court may, on application by the debtor, grant for cause shown further time, not exceeding ten debtor, and the schedules and statement of affairs, if not previously filed; *Provided, however,* That if the days, for filing the statement of the executory contracts and the schedules and statement of affairs, and such time shall not further be extended except for cause shown and on such notice and to such persons as the court may direct; . . .

§428 (11 U.S.C. §828)

Unless and until otherwise ordered by the court, upon hearing and after notice to the debtor and all other parties in interest, the filing of a petition under this chapter shall operate as a stay of any act or proceeding to enforce any lien upon the real property or chattel real of a debtor.

§472 (11 U.S.C. §872)

The court shall confirm an arrangemenut if satisfied that—

(1) the provisions of this chapter have been complied with;

(2) it is for the best interests of creditors and is feasible;

(3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt;

(4) the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this Act; and

(5) all payments made or promised by the debtor, by any person issuing securities or acquiring property under the arrangement or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with and incident to the arrangement, have been fully disclosed to the court and are reasonable, or, if to be fixed after confirmation of the arrangement, will be subject to the approval of the court.

Confirmation of an arrangement shall not be refused solely because the interest of a debtor will be preserved under the arrangement.

§481 (11 U.S.C. §881)

If the statement of the executory contracts and the schedules and statement of affairs, as provided by paragraph (1) of section 424 of this Act, are not duly filed, or if an arrangement is withdrawn or abandoned prior to its acceptance and no other arrangement is pending, or if no arrangement is accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

(1) where the petition was filed under section 421 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 422 of this Act, enter an order upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismiss-

ing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors.

§483 (11 U.S.C. §883)

a. Upon the entry of an order directing that bankruptcy be proceeded with— . . .

(2) in the case of a petition filed under section 422 of this Act, the proceeding shall thereafter be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when such original petition under this chapter was filed; . . .

b. Any contract which is entered into or assumed by a debtor in possession or trustee in a proceeding under this chapter and which is executory in whole or in part at the time of the entry of an order directing that bankruptcy be proceeded with shall be deemed to be rejected unless expressly assumed within sixty days after the entry of such order or the qualification of the trustee in bankruptcy, whichever is the later, but the court may for cause shown extend or reduce the time. When a contract entered into or assumed in a superseded proceeding is rejected, the resulting liability shall constitute a cost of administration of the supereseded proceeding.

§484 (11 U.S.C. §884)

No adjudication shall be entered under this chapter against a wage earner or farmer unless such person shall in writing filed with the court consent to the adjudication.

§606 (11 U.S.C. §1006)

For the purposes of this chapter, unless inconsistent with the context— . . .

(8) "wage earner" shall mean an individual whose principal income is derived from wages, salary or commissions.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 19

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicaple state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Rule 42 (now substantially Rule 10)

1. Within fifteen days after the appeal has been dock-

eted in this Court, the appellee may file a motion to dismiss or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss.

(a) The Court will receive a motion to dismiss any appeal on the grounds that the appeal is not within the jurisdiction of the court.

(b) The court will receive a motion to affirm the judgment sought to be reviewed on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. . .

4. After consideration of the paper distributed pursuant to the foregoing paragraph, or on its own motion when it is apparent from the record that the appeal is not within the jurisdiction of the court or that it is manifest that the questions on which the decision of the court depends are so unsubstantial as not to need further argument, the court will enter an appropriate order.

CANON 19 OF THE JUDICIAL ETHICS OF THE AMERICAN BAR ASSOCIATION

In disposing of controverted cases a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that Courts of Appeal in reversing and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repitition of er-

roneous positions of law and shall not be left in doubt by the failure of the Court to decide such questions. But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this into consideration and curtail them accordingly without substantially departing from the principals stated above.

QUESTIONS PRESENTED FOR REVIEW

The essential question before the Court on the petition for writ of certiorari is:

> IN AFFIRMING THE ORDER ADJUDGING PETITIONER A BANKRUPT HAS THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING, OR SANCTIONED SUCH A DEPARTURE BY THE LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

Petitioner has outlined numerous questions for review. These questions, however, are duplicitous and overlapping in their scope. His contentions can be answered by a consideration of four basic questions, which in turn will resolve the essential issue before the Court:

> 1. DO RESPONDENTS HAVE STANDING AS CREDITORS OF PETITIONER?
>
> 2. HAS PETITIONER BEEN DEPRIVED OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW OR SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT?
>
> 3. CAN A DEBTOR-PETITIONER IN A CHAPTER XII PROCEEDING BE ADJUDGED A BANKRUPT WITH-

OUT HIS CONSENT AND WITHOUT PROOF OF ACTS OF BANKRUPTCY?

4. WAS PETITIONER A WAGE EARNER ON THE DATE OF ADJUDICATION, AND THEREBY PRECLUDED FROM BEING ADJUDGED A BANKRUPT WITHOUT HIS WRITTEN CONSENT?

STATEMENT OF THE CASE

On September 14, 1967, petitioner, John Elwood Dennett, filed an original petition for real property arrangement under Chapter XII of the Bankruptcy Act. The petition was filed in the United States District Court for the District of Utah. The petition stated, among other things, that the petitioner was engaged in the business of real estate and other investments, was a lawyer by training and was employed as a district manager for the Duval Company. (R 1.) Petitioner is a former member of the Utah State Bar, having been disbarred by order of the Supreme Court of Utah on August 3, 1966. (R 10) *In re John Elwood Dennett*, 18 Utah 2d 129, 417 P.2d 245 (1966). The petition was not accompanied by a statement of executory contracts, list of his creditors and their addresses, a summary of his assets and liabilities or a statement of affairs, as required by Section 424 of the Bankruptcy Act. On the date of filing the petition, petitioner obtained an order of the United States District Court extending for ten days the time to file his schedule of assets and liabilities and extending for five days the time to file his statement of affairs. (R 7) The order did not extend the time for filing his statement of executory contracts. However, in the plan of arrangement filed with the original petition Article IV provided that the petitioner did not wish to reject any executory contracts except per-

haps an obligation to accept stock or purchase stock from Surety Mortgage & Investment Company. (R 6)

On September 25, 1967, the Court extended for one week the time for filing the statement of affairs and the schedule of assets and liabilities. (R150) They were not filed within the time fixed in the second order of extension. On October 5, 1967, the attorneys for respondent, A. P. Neilson, filed a motion for an order adjudging the debtor a bankrupt or dismissing the petition (R 49). On October 23, 1967, petitioner filed with the Court a petition to remove the original default and his statement of affairs and schedule of liabilities (R 69). On October 30, 1967, the Court, in a very thorough order (R 76) ordered that the motion of A. P. Neilson and the questions of petitioner's default, dismissal of the proceeding or adjudication of petitioner as a bankrupt would be considered at a hearing on November 14, 1967. A copy of that order is reproduced in full as Appendix "A". Notice of the order and the hearing was properly given to petitioner and all creditors on October 31, 1967. (R80)

Some time prior to the November 14, 1967 hearing petitioner sent a letter to his creditors (R) referring to the forthcoming hearing. In the letter he included the following statements:

> . . . A dismissal would mean an upset, delay, waste, interference, and a preference. A conversion into a regular bankruptcy would mean a small dividend to each of you of that portion of the estate achieved through liquidation . . .
>
> . . . We will try to establish a concensus of opinion, by discussion, as to whether the proceedings should

continue as Chapter XII, be dismissed, or converted into a regular bankruptcy. . . .

On the morning of November 14, 1967, prior to the hearing, petitioner filed with the Court a petition to amend his original petition and an unverified schedule of assets (R136). At that hearing, petitioner being present, the Court delivered a lengthy oral opinion from the bench, in which he discussed the matters of dismissal or adjudication and ruled that petitioner should be adjudged a bankrupt. The reporter's transcript of the proceeding on November 14, 1967 (R153) is reproduced in full as Appendix "B". During the hearing petitioner made no objection whatsoever to the Court's ruling that he should be adjudged a bankrupt. In fact, he appeared to acquiesce in the order, stating "I believe the overall objectives will be well served by this ruling." (R164 See Appendix "B", Page 47). On December 4, 1967, the Court entered its written order adjudging petitioner a bankrupt, and directing that bankruptcy be proceeded with (R148). That order is reproduced in full as Appendix "C".

On December 19, 1967, petitioner filed his Notice of Appeal to the United States Court of Appeals for the Tenth Circuit (R166). Motions to affirm the order of the United States District Court for the District of Utah were thereafter filed with the Court of Appeals by Beneficial Life Insurance Company (R 3). A. P. Neilson, Prudential Federal Savings and Loan Association, International Business Machines, Strevell-Paterson Finance Company, Beehive State Bank and Alvin I. Smith (R 5). Petitioner filed a lengthy response to the motions (R 4) and an addendum thereto (R 6). On July 15, 1968 the United States Court of Appeals for the Tenth Circuit affirmed the order

of adjudication (R 8). The lapse of time from February 1968, when the motions to affirm and response were filed, and July 15, 1968, the date of the Court's order, was due to the loss of the record. Extensive efforts by counsel for the respondents were necessary to reconstruct the record (R 175).

Petitioner thereafter filed his petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

1. The Chapter XII definition of a creditor is a broad definition, and includes all of the respondents. They are therefore entitled to participate in the proceeding.

2. By filing his original petition, petitioner voluntarily submitted himself to the jurisdicton of the court and the provisions of Chapter XII of the Bankruptcy Act. Having been an attorney he was legally trained and was fully able to comprehend the consequences of a failure to comply with those provisions. He was given every reasonable opportunity to comply with the requirements of law, and having failed to do so, then, and only then, and after notice of a hearing as required by law, was he adjudged a bankrupt. He has not, therefore, been deprived of his property without due process of law. The Chapter XII proceeding being a civil proceeding, and the Eighth Amendement prohibition against cruel and unusual punishment referring only to criminal punishment, petitioner has not been subjected to cruel and unusual punishment.

3. In a Chapter XII proceeding, if the statement of executory contracts, schedules and statement of affairs are

not timely filed the court has no alternative but to dismiss the proceeding or adjudge the debtor a bankrupt, whichever is in the interest of the creditors. No evidence of acts of bankruptcy is required. The case is thereafter treated as though a voluntary petition in bankruptcy had been filed on the date the original Chapter XII petition was filed.

4. Petitioner's assertion that he was a wage earner, and therefore precluded from being adjudged a bankrupt, is raised for the first time in his petition for writ of certiorari in this Court. The information he presented to the Court in his petition, statement of affairs and schedules excludes him from the statutory definition of a wage earner.

The respondents being proper parties to participate in the proceedings, the petitioner neither having been deprived of his property without due process of law nor being subjected to cruel and unusual punishment and being properly adjudged a bankrupt for failure to comply with the provisions of Chapter XII, and not being a wage earner, the United States District Court for the District of Utah did not err in adjudging him a bankrupt. There being no error in the proceedings in the lower court, and the court having followed its own rules in affirming the order of the lower court, after having carefully examind the record, the United States Court of Appeals for the Tenth Circuit has not so far departed from the accepted and usual course of judicial proceeding, or sanctioned such a departure by the lower court, as to call for an execise of this court's power of supervision.

ARGUMENT

1. RESPONDENTS HAVE STANDING AS CREDITORS OF THE PETITIONER

Section 406 provides that the term "claims" shall include all claims of whatever character, against a debtor or his property whether or not such claims are provable under Section 63, and whether secured or unsecured, liquidated or unliquidated, fixed or contingent. The term "creditors" means the holder of claims. These are very broad definitions and may preclude the use of the definitions of creditors and secured creditors in Sections 1(11) and 1(28), although they do not appear to be in conflict with or inconsistent with such definitions.

Respondent, Beneficial Life Insurance Company, is the fee title holder of the real property in which petitioner resides, having sold the property to petitioner under a real estate contract. Petitioner, in Schedule A-2, (R 103) acknowledges that said respondent is a creditor holding a security, and that the claim is neither contingent, unliquidated nor disputed.

Respondent, Beehive State Bank, is the holder of an obligation from petitioner, secured by property belonging to someone other than petitioner. Petitioner, in Schedule A-2, (R 105) acknowledges that said respondent is a creditor holding a security, but has indicated that the claim is unliquidated.

Respondent, Walker Bank & Trust Company, is the holder of a first trust deed on the Surety Building located at 1243 East 2100 South, Salt Lake City, Utah, in which petitioner claims an equitable interest, and in which petitioner has his office. Petitioner, in schedule A-2 (R 103), lists said respondent as a creditor holding a security and lists the claim as being neither contingent, unliquidated nor disputed. He asserts that that trust deed was signed

by A. P. Neilson and his wife as petitioner's trustee and agent.

Respondent, Prudential Federal Savings and Loan Association, is the holder of a first mortgage on a parcel of real property in which petitioner claims an interest. Petitioner, in Schedule A-2 (R105) lists said respondent as being a creditor holding a security and lists the claim as being disputed as to amount.

Respondent, Fred G. Biesinger, is the holder of a claim on a promissory note. He is listed in Schedule A-3 (R120) as being a creditor whose claim is unsecured, and whose claim is disputed.

Respondent, A. P. Neilson, is the fee title owner of the Surety Building, 1243 East 2100 South, Salt Lake City, Utah, in which petitioner claims an interest. Petitioner, in Schedule A-3 (R130), lists said respondent as a creditor whose claim is unsecured, but whose claim is disputed.

All of the respondents, therefore, fall within the broad definition of a creditor under Section 406. Petitioner's own schedules have placed all of the respondents in the category of creditors. They, therefore, have standing to act as creditors of petitioner, and certainly cannot be considered interlopers, as asserted by petitioner.

2. PETITIONER HAS NOT BEEN DEPRIVED OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW OR SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT.

By filling a petition under Chapter XII petitioner voluntarily submitted himself to the jurisdiction of the United States District Court for the District of Utah, and accepted

the consequences of his actions or failure to act, as provided in Chapter XII of the Bankruptcy Act. Section 424 (1) provides that the petition *shall* be accompanied by a statement of executory contracts, schedules and statement of affairs. Only in the event that the debtor files with his petition a list of his creditors and their addresses and a summary of his assets and liabilities can the court grant further time, not exceeding ten days, in which to file the statement of executory contracts, schedules and statement of affairs. The time cannot be further extended without showing cause, and without such notice as the court may direct.

Prior to August of 1966, the date of disbarment, petitioner was a practicing lawyer. Being legally trained he was fully capable of understanding the consequences of his failure to fully comply with the provisions of Chapter XII. His actions throughout the proceeding reflect this knowledge and comprehension.

His original petition was not accompanied by a statement of affairs, statement of executory contracts or schedules of assets and liabilities. Nor was the petition accompanied by a list of his creditors and their addresses and a summary of his assets and liabilities, this being the condition precedent to an extension of time in which to file the statement of affairs, statement of executory contracts and schedules. In paragraphs 6, 7 and 9 of his petition (R 2), referring to Section 424 (1), he requested additional time in which to file a statement of affairs and schedule of assets and liabilities. Despite his failure to file the list of creditors and summary of debts and assets with the petition, he was given an additional ten days in which to file the schedules and five days in which to file the statement of affairs

(R 9). The court evidently felt that petitioner's representations in paragraph 8 of his petition, to the effect that he had no executory contracts (R 2), was sufficient to be considered a statement of executory contracts (R 77). Section 406(4) provides that the term "executory contracts" shall include unexpired leases of real property. Petitioner interprets this, in paragraph 8 of his petition to mean that only unexpired leases are executory contracts under Chapter XII proceedings. However, Section 483b discusses an executory contract as being any contract which is executory in whole or in part. Sections 70b, 238b and 378b use similar language. Respondents therefore urge that an executory contract, even under Chapter XII, is a contract which is not yet performed on one side or the other, and is not limited under Chapter XII to unexpired leases. Article IV of petitioner's plan (R 6) indicates that he has executory contracts, other than unexpired leases of real property, for he makes the statement that he

> . . . does not wish to reject any executory contract except perhaps an obligation to accept stock or purchase stock from Surety Mortgage & Investment Co.

Petitioner appears, therefore, to have been in default under Secion 424(1), in failing to file a statement of executory contracts. Such a statement was never filed, although such failure was not used by the court as a basis for adjudication.

Petitioner did not file a statement of affairs within five days or the schedules within ten days. On September 25, 1967, he was given another week to file both the statement of affairs and the schedules (R 150, although he still

had not filed a list of creditors and summary of assets and liabilities.

On October 4, 1967, after petitioner had failed to file any of the documents within the extended time, A. P. Neilson moved the court, pursuant to Section 481, to either adjudge him a bankrupt or dismiss the proceeding (R.49). Petitioner did not file a statement of affairs and schedule of liabilities until October 23, 1967 (R150), and he did not file a schedule of assets until the morning of November 14, 1967 (R150). Even then his schedule of assets was not under oath (R159) as required by Section 7a(8).

Petitioner, at page 15 of his petition and brief, alleges a "stragem" by Alvin I. Smith and John G. Marshall to prevent him from preparing the schedules of assets and liabilities which should have been filed within ten days from the date of filing the original petition. He asserts that this alleged "stratgem" defied the statutory injunction of Section 428 and the specific reinforcing order of United States District Judge A. Sherman Christensen. In making these assertions he refers to matters which are outside of the record before this Court. In answering these particular allegations, respondents must therefore refer to matters which are also outside the record before this Court.

The alleged "stratgem" of Messrs. Smith and Marshall arose out of quiet title proceedings brought against petitioner's wife and others in Case No. 171265 before the District Court of Salt Lake County, State of Utah, in which the petitioner was a party only by virtue of being a plaintiff in intervention. The quiet title action was not an "act or proceeding to enforce any lien upon the real property

or chattel real of a debtor" as would warrant an automatic stay under Section 428. The "specific reinforcing order" of Judge Christensen referred to by petitioner could only have been the order of September 14, 1967, (R 9) which was amended September 19, 1967 (R 25) to exempt Case No. 171265 from its provisions for the reason that said case "was not an action against petitioner, but rather against his wife."

Petitioner discusses a receivership proceeding and other matters in the State courts. If he had a proper basis for additional stay orders, he could have obtained such an order either in the State court proceedings or in the Chapter XII proceeding.

Notwithstanding the assertions now, that he was prevented from filing his schedules of assets and liabilities by actions in the State courts, he did not make such an explanation or assertion to the United States District Court for the District of Utah in the Chapter XII proceeding.

At the hearing on November 14, 1967, which was held after ample notice, and which petitioner attended, it was determined that petitioner should be adjudged a bankrupt. Petitioner filed no answer to the motion of A. P. Neilson and made no objection to such determination, but in fact acquiesced by saying that "the overall objectives would be served by this ruling." (R 69)

Petitioner was not surprised by the action of the court in adjudging him bankrupt. He had suggested in a letter to his creditors (R) prior to the November 14 hearing that the three alternatives would be to continue the Chap-

ter XII proceeding, to dismiss the proceeding, or to convert the proceeding into a regular bankruptcy.

Section 481 gives the court no discretion if petitioner does not comply with Section 424(1). Relating that section to the instant case, where the petition was filed under Section 422, if the schedules and statement of affairs are not filed or if confirmation is refused, the court *shall* enter an order upon hearing, after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with or dismissing the proceeding under Chapter XII, whichever in the opinion of the court may be in the interest of the creditors. The court must either adjudge the debtor a bankrupt or dismiss the proceeding. There appears to be no way that a debtor can remedy his failure to comply with Section 424(1).

The court also found that petitioner's proposed arrangement did not comply with Section 461 and that the plan had not been filed in good faith, as required by Section 474(4) (R 151).

Petitioner selected the court and the law for his proposed arrangement. He was the one that failed to comply with the provisions of that law. He was fully informed, received notice and opportunity to be heard at all stages of the proceeding, and fully expected the end result, bankruptcy. He was not deprived of his property without due process of law.

The above argument is also the answer to petitioner's contentions that he has been the victim of cruel and unusual punishment. He was adjudged a bankrupt because the

law that he had selected demanded adjudication or dismissal, whichever was in the interest of the creditors. The remedy, therefore is not a penal remedy, its purpose being the protection of the creditors. The adjudication, therefore, is not in violation of the Eighth Amendment. *Trop vs. Dulles,* 356 U.S. 86, 2 L. Ed. 630, 78 Sup. Ct. 590 (1958), see also *Zwick vs. Freeman,* 373 F. 2d 110 (2d Cir. 1967).

3. A DEBTOR-PETITIONER IN A CHAPTER XII PROCEEDING CAN BE ADJUDGED A BANKRUPT WITHOUT HIS CONSENT AND WITHOUT PROOF OF ACTS OF BANKRUPTCY.

Section 402 makes the provisions of Chapters I to VII of the Bankruptcy Act applicable to Chapter XII proceedings insofar as they are not inconsistent with or in conflict with the provisions of Chapter XII. Section 412 provides that where not inconsistent with the provisions of Chapter XII the jurisdiction, powers and duties of the court are the same, where a petition is filed under Section 422, as is the case here, as if a *voluntary* petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition was filed. As previously discussed, Section 481 directs the court to dismiss the proceeding or adjudge the debtor a bankrupt if he fails to file certain documents or take certain actions. Section 483 provides that where a petition is filed under Section 422, upon the entry of an order directing that bankruptcy be proceeded with the proceeding shall thereafter be conducted, so far as possible, as if a *voluntary* petition for adjudication had been filed and a decree of adjudication had been entered on the day when the original Chapter XII petition was filed. Sections 4 and 59 provide that any person, except a municipal, railroad, in-

surance or banking corporation or a building and loan association, is entitled to the benefits of the Bankruptcy Act, and may file a petition to be adjudged a voluntary bankrupt.

The provisions of Chapters I to VII dealing with involuntary petitions in bankruptcy, acts of bankruptcy and the pleading and proof of acts of bankruptcy are inconsistent with and in conflict with the Chapter XII provisions concerning adjudication, and therefore not applicable.

Petitioner, being a person qualified to file a petition to be adjudged a voluntary bankrupt, having filed a petition under Chapter XII and having failed to comply with the provisions of Section 424(1), can be adjudged a bankrupt without his consent and without proof of acts of bankruptcy. All further proceedings should be conducted as though he had filed a petition to be adjudged a voluntary bankrupt.

4. PETITIONER WAS NOT A WAGE EARNER ON THE DATE OF ADJUDICATION AND THEREFORE NOT PRECLUDED FROM BEING ADJUDGED A BANKRUPT WITHOUT HIS WRITTEN CONSENT.

Section 484 provides that no adjudication shall be entered against a wage earner unless he has filed with the court a written consent to the adjudication. Chapter XII contains no specific definition of a wage earner, but the definition of wage earner in Section 1(32) is made applicable to Chapter XII by Section 402. This definition contains two requirements: (1) the individual must work for wages, salary or hire, and (2) must earn not in excess of $1,500 per year. This definition has remained unchanged in the Bankruptcy Act since 1898. 1*Collier on Bankruptcy,*

Paragraph 1.32 further elaborates upon the statutory definition as follows:

> The term applies to those who are dependent for a living upon the result of their individual effort, without the aid of property or capital. To bring a person within the definition it should appear that the earning of wages is his predominant and substantially exclusive occupation.

A similar statement is found in *First National Bank of Wilkes-Barre vs. Barnum,* 160 Fed. 245 (N.D. Penn. 1908) wherein the court stated:

> A wage-earner is defined by the bankruptcy act as one 'who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year.' By this it is evidently intended to relieve from adverse proceedings those who, not being engaged in business or trade, depend for a living upon the result of individual labor or effort, without the aid of property or capital. But not all of this class are exempt, as is shown by the limit of $1,500. And the work done must be such as is compensated by wages, salary, or hire, other earnings not being put in the same category.

All of the information presented to the District Court by petitioner indicates that he is in business for himself rather than a wage earner. In fact, his assertion that he is a wage earner, and thereby precluded from being adjudged a bankrupt without his written consent, appears for the first time in his petition for writ of certiorari to this Court. In his petition he indicates that he is engaged in the business of real estate and other investments (R4....), and he recites that he has had his principal place of business at 1243 East 2100 South, Salt Lake City, Utah, within

the District of Utah, "for a longer period of the six months immediately preceding the filing of the petition than in any other judicial district." On October 23, 1967, he filed a statement of affairs for a debtor engaged in business. (R. 99.) In Paragraph 1 of the statement of affairs he answered the question regarding the business in which he was engaged as follows:

> Duval Company of Utah and Investment and Insurance Service. Prior thereto an attorney at law, systems consultant and real estate investments.

He indicated that all business had been conducted from 1243 East 2100 South, Salt Lake City, Utah, and was conducted in his own name. In Paragraph 5 he indicated that in the two years immediately preceding the filing of the original petition he had earned $5,500 from sources, other than the operation of his business. A review of schedules A-2 and A-3 (R. 103) reveals that the bulk of the obligations listed therein are business obligations. They include obligations for office furniture, lease of a microfilm machine, conditional sale of a card punch machine, conditional sale of an accounting machine, mortgage and trust deed obligations on real estate, law books, car rental, equipment repairs, deposition reporting, surveying, printing of briefs, business forms, office supplies, airline tickets, constable's services and office rent. His B-1, (R. 137) B-2 (R. 139) and B-3 (R. 140) schedules list as assets 12 parcels of real estate, office equipment, stock and numerous liquidated and unliquidated claims.

If petitioner had in fact been a "wage earner", he could have filed a petition and plan of arrangement under Chater XIII. Section 606 of that Chapter defines a wage earner

as an individual whose principal income is derived from wages, salary or commissions. There is no limit on the income as there is in Section 1(32). Had petitioner considered himself to be a wage earner at the time of filing his petition, he would have filed under Chapter XIII. The fact that he filed a petition under Chapter XII evidences his own impression that he was in business.

Petitioner's claim that he is a wage earner is strikingly similar to the claim made by appellants in the case of *Carpenter vs. Cudd,* 174 Fed. 603 (4th Cir. 1909). The facts stated at page 604-5 are as follows:

> The evidence showed that Carpenter had been interested in a mercantile business for upwards of 20 years, first as a partner and subsequently as sole owner; that in January, 1907, one year before the bankruptcy proceeding was instituted, he converted this enterprise into a corporation under the name of the W. C. Carpenter Company, with a capital stock of $25,000, of which he retained $17,600. Small lots of stock were also sold to other persons, for the most part employees of the company. He became president of the corporation, and his salary was fixed at $900 per annum; but in addition to this sum, although no dividends were declared, he drew about $2,000 from the business during the year. According to his own testimony, he had other and more valuable interests than his holdings in this corporation. He was engaged in collecting the outstanding accounts due the firm which formerly conducted the business then incorporated — his share of which he estimated to be worth $25,000. He had a one-third interest, estimated by him to be worth more than $8,000, in a copartnership engaged in the lime business, although he was not actively engaged in the management of its affairs. He was joint owner of numerous pieces of real estate, town

lots and farm lands, most of which were in or near the town of Gaffney, where the mercantile business was located. He was the holder, with others, of options upon 385,000 acres of land in Kentucky, and from his real estate ventures he expected to realize large profits. In all Carpenter estimated his property to be worth about $106,000.

The court examined the Congressional intent and ruled that the bankrupt was not a "wage earner" within the Bankrutcy Act definition:

> It is contended by the appellants that inasmuch as the bankrupt was the president of the W. C. Carpenter Company, and as such was paid a salary of $900 per year, he was a wage-earner under the definition cited above. But every individual who is paid a salary of less than $1,500 per year is not therefore necessarily a wage-earner within the meaning of the law. A person extensively engaged in some mercantile or manufacturing business might at the same time incidentally earn a salary less than $1,500 per year in some collateral employment; or the individual owner of a large business might incorporate it, and, being entitled as the holder of a great majority of the stock to practically all of the dividends earned, might prefer that his salary as president and head of the business should be placed at a nominal figure, or at a figure less than $1,500 per year, and much less than he would expect to draw for his services in the management of the business. Manifestly Congress did not intend to exempt persons such as these from the operation of the law.
> In the case at bar Carpenter was nominally drawing only $900 salary per year, but he owned two-thirds of the stock of the corporation and had such control over its affairs that he actually drew more than $2,000 additional during the year preceding the institution of bankrutcy proceedings. His own testimony justifies the conclusion that he was also in the business of buying and selling real estate. He

> estimated the value of his holdings outside of the W. C. Carpenter Company to be worth nearly $90,000. Under these circumstances he cannot be held to be a wage-earner in the sense of the statute, and the decision of the court upon the evidence offered upon this point was correct.

See also, In re *Gainfort*, 14 Fed. Supp. 788 (N. D. Cal. 1936).

Not only did petitioner, by his own admission, earn more than the $1,500 limit of compensation for the statutory definition of a wage earner, but the record is absolutely devoid of any contention by petitioner that he was a wage earner and devoid of any evidence which would so indicate. It is apparent that the earning of wages is not his predominant and substantially exclusive occupation, and that he is not a person intended by Congress to be included within the definition of wage earner. This being the case, the District Court did not err in adjudging him a bankrupt without his written consent.

IN AFFIRMING THE ORDER ADJUDGING PETITIONER A BANKRUPT, THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING OR SANCTIONED SUCH A DEPARTURE BY THE LOWER COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISION.

Respondents are proper parties to this proceeding and the proceeding in the lower court. Petitioner was not deprived of his property without due process of law. He was not subjected to cruel and unusual punishment. He was a party qualified to be adjudged a bankrupt. He was not

a wage earner. The United States District Court for the District of Utah did not, therefore, err in adjudging him a bankrupt.

After petitioner filed his notice of appeal, respondents and other creditors filed motions to affirm the order of the District Court. These motions, supported by legal authorities, were made pursuant to Rule 42(1)(b) of the Rules of the United States Court of Appeals for the Tenth Circuit, on the grounds that the questions on which the decision of the cause depend were so unsubstantial as not to need further argument. Petitioner filed a 19 page memorandum and a 3 page addendum and appendix in response to these motions. (R. 4, 6.) The Per Curiam opinion and order of the Court of Appeals was also made pursuant to Rule 42. It found that

> It is manifest from a review of the record that there was a substantial basis for the district court's action . . .

The only questions raised by petitioner in the memorandum filed with the Court of Appeals were the standing of the creditors who made the motions to affirm and the power of the District Court to adjudge him a bankrupt. He did not raise the constitutional issues nor did he raise the issue of his being a wage earner. The Court of Appeals cited, in its opinion, Section 481 (11 U.S.C. § 881), the principal section of the Bankruptcy Act relied on by respondents here as being the authority for the District and with proof of acts of bankruptcy.
Court to adjudge petitioner a bankrupt without his consent

Petitioner claims that the Court of Appeals has de-

parted from the accepted and usual course of judicial proceeding by hearing a motion of interlopers, by cutting off the appeal without receiving briefs, by failing to consder important issues of law, constitutional matters and procedural facts, and by rendering an opinion which does not discuss questions of law and the reasons for affirming the lower court. Respondents have previously discussed all of those issues, with the exception of petitioner's claim that the failure to indicate the court's views on questions of law was a violation of Canon 19 of the Judicial Canons of Ethics of the American Bar Association, and thus a departure from the accepted and usual course of judicial proceedings. On page 11 of his petition and brief, the petitioner has quoted Canon 19. His quote of paragraph 2 of Canon 19 is as follows:

> It is desirable that Courts of appeals . . . . should indicate their views on questions of law argued before them and necessarily arising in the controversy.

The above quote would lead one to believe that a Court of Appeals should, in every case, indicate its views on questions of law argued before them. However, petitioner has only quoted part of paragraph 2. The full text of paragraph 2 is as follows:

> It is desirable that Courts of Appeal *in reversing and granting new trials* should so indicate their views on questions of law argued before them and necessarily arising in the controversy *that upon the new trial counsel may be aided to avoid the reptition of erroneous positions of law and should not be left in doubt by the failure of the Court to decide*

such questions. (Emphasis added)

Petitioner's quote omitted those words in italics, which added words import an entirely different meaning to the paragraph than the meaning urged by petitioner.

Neither the United States District Court for the District of Utah nor the United States Court of Appeals for the Tenth Circuit has departed from the accepted and usual course of judicial proceeding. There is, therefore, no reason for an exercise of this court's power of supervision.

CONCLUSION

Respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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I, John H. Allen, a member of the Bar of the Supreme Court of the United States, and one of the counsel of record for the respondents, do hereby certify that a copy of Respondents' Brief was served upon petitioner, John Elwood Dennett, and all persons and firms listed in appendices F and G of petitioner's brief, by mail, by depositing the

same in a United States post office, with first class postage prepaid, address to John Elwood Dennett 1243 East 2100 South, Salt Lake City, Utah and to each of the persons and firms at the address shown in appendices F and G of Petitioner's brief, on the ..... day of May, 1969, pursuant to Rule 33, Rules of the Supreme Court of the United States.

.....

JOHN H. ALLEN

APPENDIX A

IN THE MATTER
JOHN ELWOOD DENNETT,
Petitioner.
B-1153-67

IN CHAPTER XII PROCEEDINGS
ORDER

The above named petitioner having filed a petition for a real property arrangement in reliance upon Section 12 of the Bankruptcy Act, 11 U.S.C. 822; and A. P. Neilson having moved the court in reliance upon Section 481 of the Bankruptcy Act, 11 U.S.C. 881, either to adjudge the debtor a bankrupt or to dismiss the petition by reason of the petitioner's failure to comply with Section 424 of the Bankruptcy Act, 11 U.S.C. 824, by filing with the petition a list of creditors and their addresses and a summary of assets and liabilities and for failure to file any statement of executory contracts, schedules and statement of affairs within the time required by the Bankruptcy Act and any

extension granted by the court; and it appearing that any such adjudication or dismissal under 11 U.S.C., Section 881 as amended, may not be granted without notice to creditors as well as to debtor and any other person specified by the court's order, 11 U.S.C. Sec. 881(2), as amended; see also *Rader v. Boyd,* 267 F.2d 911 (10th Cir. 1959); and the petitioner having now lodged with the court out of time a purported list of creditors and their addresses, together with statement of affairs and a schedule of assets and liabilities, and having moved that he be relieved of defaults in filing said papers within time; and it appearing from the allegations of the petition that the defendant has no executory contracts and that the proposed arrangement by petitioner is an arrangement "to pay all undisputed debts in full, and no part of which is intended to discharge any debt, except through payment, but which will permit the operation by the petitioner, of his estate, without interference, and insure the orderly management, and if necessary, liquidation of portions of said estate, in order to pay the debts of the petitioner in full;" and the court entertaining doubt whether such an arrangement is an adequate statement of a proposed arrangement and whether it is such an arrangement as is contemplated by Chapter XII of the Bankruptcy Act rather than by the ordinary course of bankruptcy; and the question having been raised as to whether state litigation affecting the title to certain real property claimed by the petitioner and other parties claiming adversely to the petitioner in which litigation a state court has appointed a receiver to hold and operate said property must or should be permitted to continue;

IT IS NOW BY THE COURT HEREBY ORDERED that further consideration of the foregoing matters be continued until November 14th, 1967 at 9 o'clock a.m., or as soon thereafter as interested parties may be heard, in the courtroom of this court at Salt Lake City, Utah, at which time and place all interested persons, or their counsel, will be heard on the questions of whether the said petition and proceedings for an arrangement should be dismissed, or in the alternative whether petitioner should be adjudged a bankrupt, whether the petitioner should be relieved of his

default in failing to timely file a list of creditors and other documents; whether the arrangement proposed is such as is contemplated by Section XII and is filed in good faith, and if not whether the petition for this reason should be dismissed, whether the court can and should permit a determination in the state court of the adverse claims of the petitioner to certain real property to be litigated in the state court proceedings and the said state court receiver to maintain possession of said real property pending said determination, or whether the court can and should restore the petitioner or a trustee for creditors herein to the possession of said real property, and whether if petitioner is relieved of his defaults and said arrangement proceeding continues, the proceeding should be referred to the Referee in Bankruptcy for further administration.

Upon said hearing this court will make and enter such order or orders as it may deem appropriate in the premises, and at said time will further consider any related motion or motions which may properly be brought to the attention of the court.

For the purposes of said hearing petitioner may take the deposition of A. P. Neilson, the court deeming the objections filed herein to the taking of said deposition insufficient on their face as a matter of law, in view of the appearance and pending motion of A. P. Neilson herein.

The Clerk of this Court is directed to mail a copy of this order to each of the creditors listed upon the schedule of the debts of the bankrupt now tendered into court by the petitioner at the respective addresses therein indicated, and upon all parties or counsel who have appeared in this proceeding and upon the petitioner.

Dated this 30th day of October, 1967.

/s/ A. Sherman Christensen
UNITED STATES DISTRICT JUDGE

APPENDIX B

Before: The Honorable A. Sherman Christensen,
United States District Judge.

IN THE MATTER OF
JOHN ELWOOD DENNETT,
Petitioner.
No. B 1153-67

REPORTER'S TRANSCRIPT OF ORAL OPINION OF THE COURT IN HEARING ON ALL PENDING MOTIONS AND QUESTIONS

November 14, 1967
Salt Lake City, Utah

APPEARANCES:

Receiver:	ALVIN I. SMITH
Referee:	BRUCE S. JENKINS
For petitioner:	Pro Se
For A. P. Neilson:	JOHN G. MARSHALL
For IBM:	WILLIAM G. FOWLER
	KEITH SOHM
	FRED L. FINLINSON
	J. THOMAS GREENE
	MILAN B. ROBBINS
	L. H. CALLISTER, JR.
	HAROLD WALDO, JR.
	ROBERT M. ANDERSON
	EARL D. TANNER
	PAUL M. HALLIDAY
	EARL S. SPAFFORD
	ROBERT CUMMINGS

Nine o'clock a.m. Tuesday, November 14, 1967

* * *

THE COURT: When this matter was initially presented to me, I had no information as to the facts; but the record will indicate what was done with regard to stays and a reconsideration of stays, and a modification of the stay granted.

In subsequent proceedings, despite a feeling apparently held on both sides, I endeavored to keep myself free from that feeling, which to my mind could well have generated more heat than light. I felt that a Court should in a substantial matter such as this, and particularly in furtherance of the purposes of the Bankruptcy Act, be circumspect, not jump at conclusions, particularly as they might be affected by claims of prejudice or lack of prejudice or claims as to status of parties which didn't affect their right to be heard.

I have given the matter careful consideration, and I have kept the record open to relieve the petitioner of defaults or failures of mere form, to the extent that a considered and full hearing might indicate that such a relief would be in the interest of justice.

I think it just as important as that courts guess right in expedition that they give everyone a fair opportunity to be heard.

I cannot assume that any other court will not do so, but certainly I can assure that my court will do so to the best of its ability.

I think all interest now, to the extent they have appeared, have had a fair opportunity to be heard upon the issues for determination by this court.

Apart from matters of — strike that.

There are certain matters with respect to which I have a discretion — that is, relief — as to defaults and filing of papers, and to a certain extent, with the conversion of this proceeding into a bankruptcy proceeding in the ordinary course of the Bankruptcy Act; and then there are

certain matters, of course, concerning which I have no discretion.

The matters concerning which I have no discretion may depend upon the evaluation of the record. Evaluating the record, we start out with a petition, which upon examination does not indicate a proposal for an arrangement in the sense contemplated by Chapter XII. It didn't contain other requirements which the Court granted an extension on, but without jurisdiction, in the absence of the submission of a list of creditors.

The evidence now indicates that Mr. Dennett probably had as a primary objective in the filing of arrangement proceedings here the foreclosure of state court proceedings and a suit to quiet title, or orders which might control or limit the manner of adjudication in that proceeding, which objectives appear not only beyond my power, but contrary to the basic division of power between federal and state courts, convinced as I am that there is at least some substantial question as to the adverse claims of Mr. Neilson and his rights thereunder as affecting this petitioner.

It may well be that by reason of some of the circumstances here the record could be regarded as so strongly indicating that Mr. Neilson received the property in trust for someone. But that is a matter which is now being adjudicated; and once the forum is decided, I'm sure that the state court will proceed to proper adjudication. At least, there is enough suggested in the record here to make me clearly of the opinion that the — Mr. Dennett or his — or, trustee representing his creditors may have a substantial property interest.

If Mr. Dennett is correct, the suggestion that Mr. Neilson has carried this property not as his own, not claiming depreciation expenses, and if Mr. Neilson is either unwilling or in such a little position to know in what capacity he has claimed the property, as suggested by his deposition, there is a strong suggestion that any claim by a trustee on behalf of the creditors to that property, subject to any

valid liens or charges, would not be merely colorable or fanciful.

On the other hand, there is indication in view of Mr. Dennett's position with regard to deeds, the affidavit received in evidence ,and other matters, that as between him and Mr. Neilson, aside from the question of what the situation would be with regard to his wife, Mr. Neilson's claims, adverse claims, are not merely colorable, but may represent — do represent — substantial claims.

It seems obvious to me that with regard to the resolution of these claims, there can't be a summary disposition by this court, certainly not under arrangement proceedings; and if that can't be, it seems a fair interpretation of the whole proceedings here that at least one of Mr. Dennett's major reasons for filing the Chapter XII proceedings would be frustrated.

His remaining reason — and I take it at its face representation — is that he wants to protect his creditors and to see that his creditors are paid without diminution of their claims, to the extent that that's possible.

No plan has really been submitted up to this time, or no suggestion made of any substance or depth in the Court's opinion that this can be done in any way other than through liquidation, the appropriation of the property to the claim. There has been no suggestion that any additional money from other sources is to be put into the plan; and there has been a suggestion if time is granted the liquidation to the extent necessary could be more orderly than one in bankruptcy, the creditors can be paid.

But as I look over the statement, the schedule of property, and consider a couple of items in view of representations made here, indeed it appears quite dubious that there won't be some substantial deficiency.

In any event, and it certainly appears that the petitioner was indeed in a position to either seek the aid of

on arrangement or the bankruptcy by reason of his financial condition.

In addition to the apparent motivation, some perfectly legitimate and some perhaps illusionary, in filing the proceeding, and in addition to the absence of any plan submitted even in form, not to mention in substance, there are other things that the Court cannot disregard and permit further proceedings by way of arrangement with any assurance or with any indication that such arrangement could be consummated.

Manifestly, an arrangement more than bankruptcy, particularly where the debtor is motivated by the objective of remaining in possession or control of the property, depends a great deal upon the proper processing of the proceeding. And here, whether due to pressures or otherwise Mr. Dennett has, despite the most liberal and circumspect attitude, it seems to me, on the part of the Court, with the hope that these things could be corrected, has been almost constantly in default. Papers that would be helpful to the Court are filed the last minute.

Even after the Court granted an extension, without the filing of the requisite list of creditors, the statement of affairs wasn't filed within the extended time. The list of creditors was filed out of date, which is in the nature of a jurisdictional matter, unless relief against the default is granted. Up until today, nothing was filed which would permit the Court to form even a tentative judgment as to the relative debts and property in total.

When they were tendered this morning, the schedule of property, they weren't verified. The schedule of debts wasn't totaled.

If there is any way to present a proceeding, whether out of pressures or not, Mr. Dennett, in the way it shouldn't be presented, this has been it and, indeed, I have been furnished no assurance that the situation would change, except through the appointment of a trustee. And as I com-

pare the two matters, I have the conviction that, without casting any aspersions at all, and realizing that you have had problems, which are even beyond those of your own making, which is saying quite a deal, because of barriers that apparently have been placed in your way by some wholesale charges growing out of your disbarment or other things — and after I have cut myself loose from any feeling in that respect — I still must say that in the combination of circumstances I can't find that this proceeding is being conducted in good faith.

By reason of the defaults, which I am not in a position to excuse now, because of this totality of circumstances, because I feel that bankruptcy proceedings in the regular course of the Bankruptcy Act will be more productive, from the petitioner's interest, as well as the interest of the creditors, in the last analysis, I think that the matter should be converted into a regular bankruptcy proceeding; and that will be the order now.

I wonder, Mr. Fowler — I don't mean to place upon you an undue burden, but I think someone more interested in the creditors in general than in those two conflicts here that have come up against each other should draw an appropriate order. Would you undertake that?

MR. FOWLER: Yes, sir, I shall.

THE COURT: Unless some other representative of a creditor desires to volunteer.

I hear no volunteers.

I would appreciate your submitting a copy of the proposed order to Mr. Dennett, and to — well, rather than put a heavier burden upon you, if you will do that, and upon Mr. Marshall, and Mr. Smith, we will have copies sent to those who have made their appearance here by Xerox.

Now, is there any other suggestion or anything fur

ther?

MR. MARSHALL: Yes, your Honor. May I inquire as to the disposition of my motion to refer the matter, with respect to the pending case, to the District Court of Salt Lake County?

I would assume that —

THE COURT: Well, I think the effect of this order will be to vacate the injunction. I will be advised of that. But to vacate the injunction. And there should be a reference to the referee in bankruptcy, for examination, among others things, of the appointment of a receiver, or a trustee, or both, in sequence, without prejudice to such further orders as he may make.

MR. MARSHALL: Of course, the case that I have pending is against Mr. Neilson and Mrs. Dennett; and it's my understanding of the Bankruptcy Act, if this is converted into a regular bankruptcy, that should proceed, because the Referee in Bankruptcy has not jurisdiction to determine title, just as this court wouldn't.

So that that would be the effect of your order. And I just like a little clarification if that's correct.

THE COURT: Well, the injunction is vacated, with the effect of this — the effect of this order would be the vacation of the injunction. Now, what further proceedings is to be had before the referee will be determined by him in the first instance, subject to review by me.

My own feeling is that in view of my finding that there is a substantial claim by your client that is more than merely colorable, as far as Mr. Dennett is concerned, that I would have no further power to enjoin the proceedings and upon the entry of this order, it will just have to take its place along with any other matter involved in a bankrupt

MR. MARSHALL: Thank you.

MR. DENNETT. Your Honor —

THE COURT: Now, I would say that if it becomes necessary in order to preclude a precipitous determination before, the trustee or receiver can check into the status of the state litigation. If I have any residual power, I'll exercise it; but I don't anticipate that proceeding on the assumption that we're all interested in justice being done.

MR. MARSHALL: We intend to give him every opportunity to make an appearance and to familiarize himself with the case. If he wants to do anything before pretrial, that's fine.

THE COURT: All right. Yes.

MR. DENNETT: As I understand your Honor's order, this would contemplate, of course, the appointment of a referee in the regular course of the Chapter VII proceedings.

THE COURT: Yes. It is referred now, will be referred, by the order to the referee.

MR. DENNETT: I meant a trustee in the 7 proceedings.

THE COURT: I would contemplate that that would be so.

MR. DENNETT: That trustee then would succeed to my possession in that lawsuit Mr. Marshall refers to?

THE COURT: Yes. Unless a receiver is appointed in the meantime as a temporary matter before the trustee can be appointed.

MR. DENNETT: This leaves a question; that is, if the Court lifts the injunction in the state court before a

trustee is appointed in the Chapter VII proceedings, what happens in the interim? Might I suggest — and just suggest — that the matters might be aided if until we can get a trustee appointed, that the Court continue the stay in the state court only until then, to expire by its own force, until the trustee is appointed in the VII proceedings.

THE COURT: Do you have a view on that, Mr. Fowler?

MR. FOWLER: Your Honor, I think upon the representation of counsel for the plaintiffs in that matter — in the state court receiver — that they're not going to go forward until such time as a receiver or trustee enters his appearance . I think that would satisfy —

THE COURT: It seems to me that if they try to precipitously push it along, there must be sufficient power —

MR. FOWLER: There will be creditor interest in it.

MR. SMITH: However, I believe that the other point perhaps Mr. Dennett is referring to is as to what the position of the receiver is at this time.

MR. DENNETT: That's my concern, your Honor.

MR. SMITH: That's his concern, and it's my concern too. By this, I understand upon this matter being dismissed I as receiver have no — and relegated to my former position — that I have been stayed — and that I can then proceed with administering this property.

THE COURT: I think that's inescapable. I feel so. Yes.

MR. DENNETT: I believe the overall objectives will be well served by this ruling.

THE COURT: I hope so.

MR. DENNETT: I state, maybe redundantly, but I

hope that the creditors will be paid. If anything that any of us can provide by way of a vehicle to that end, I think it's compatible with all of our objectives. That's what I hope first and foremost is that the creditors be paid.

THE COURT: Very good, Mr. Dennett; and in that climate, we should have a successful administration as the facts and circumstances will permit.

Thank you, gentlemen. We will stand in adjournment.
(Whereupon an adjournment was taken at 12:28 p.m.)

APPENDIX C

In the Matter of:
JOHN ELWOOD DENNETT,
Debtor.
No. B. 1153-67

In Chapter XII Proceedings
ORDER ADJUDICATING DEBTOR A BANKRUPT AND DIRECTING BANKRUPTCY

This matter having come on regularly for hearing before the undersigned on the 14th day of November, 1967, pursuant to the order of this Court made and entered the 30th day of October, 1967, to consider whether the said petition and proceedings for an arrangement should be dismissed or in the alternative whether petitioner should be adjudged a bankrupt, whether the petitioner should be relieved of his default in failing to timely file a list of creditors and other documents, whether the arrangement proposed is such as is contemplated by Section XII and is filed in good faith, and if not whether the petition for this reason should be dismissed, whether the court can and should permit a determination in the state court of the adverse claims of the petitioner to certain real property to be litigated in the state court proceedings and the said

state court receiver to maintain possession of said real property pending said determination, or whether the court can and should restore the petitioner or a trustee for creditors herein to the possession of said real property, and whether if petitioner is relieved of his defaults and said arrangement proceeding continues, the proceeding should be referred to the Referee in Bankruptcy for further administration; and due notice of said hearing having been given by mail to said debtor, his creditors and all other parties in interest; the debtor appearing in person; and the court having considered the evidence on the issues presented herein and having heard the arguments of counsel,

NOW upon the pleadings on file herein and the orders of the court heretofore made and entered, and all the proceedings had before me at the said hearing, and due deliberation having been had thereon; the

COURT DOES FIND

1. That the debtor filed an original petition for relief in accordance with the provisions of Chapter XII of the Act of Congress relating to bankruptcy on September 14, 1967, proposing an arrangement with creditors.

2. That said petition was not accompanied by a Statement of Affairs, a statement of executory contracts, or schedules of assets and liabilities.

3. That on the 14th day of September, 1967, an order was made and entered granting to the debtor ten days to file schedules and five days to file a statement of affairs; that the debtor failed to comply with the provisions of said order.

4. That on the 14th day of September, 1967, an order was made and entered staying suits against the debtor, which order subsequently was amended on the 19th day of September, 1967.

5. On the 25th day of September, 1967, an order was made and entered extending for one week the time fixed for filing the statement of affairs and the schedules; that the debtor failed to comply with the provisions of said order.

6. On the 4th day of October, 1967, A. P. Neilson moved the court in reliance upon Section 481 of the Bankruptcy Act, (11 U.S.C. 881), either to adjudge the debtor a bankrupt or to dismiss the petition by reason of the petitioner's failure to comply with Section 424 of the Bankruptcy Act, (11 U.S.C. 824), by filing with the petition a list of creditors and their addresses and a summary of assets and liabilities and for failure to file any statement of executory contracts, schedules and statement of affairs within the time required by the Bankruptcy Act and any extension granted by the court.

7. On or about the 23rd day of October, 1967, debtor lodged with the court a petition to remove original default, and his statement of affairs and schedules of liabilities.

8. On the 14th day of November, 1967, debtor lodged with the court a petition to Amend Original Petition and an unverified schedule of assets.

9. That the proposed arrangement does not comply with the provisions of Section 461 of the Bankruptcy Act (11 U.S.C. § 861), nor is the proposal filed in good faith in accordance with the provisions of Section 472(4) of said Act (11 U.S.C. § 872).

10. That the failure of the debtor to file a statement of affairs and schedules of assets and liabilities in accordance with the requirements of the Bankruptcy Act and the orders of this court cannot be excused, and the debtor has failed satisfactorily to explain his default.

11. That the matter presently pending in the Third Judicial District Court in and for Salt Lake County, State of Utah, wherein A. P. Nielson is seeking to quiet title to real property in which the debtor claims an interest, and

which action was stayed upon the application of the debtor, should not be further stayed by this court, it appearing that the objectives sought by the debtor are beyond the power of this court and that said state court has proper jurisdiction of the matters raised in said action.

12. That it would be in the best interest of the creditors of the debtor to adjudge him a bankrupt and direct that bankruptcy be proceeded with; and it is

ORDERED, ADJUDGED AND DECREED

13. That John Elwood Dennett is a bankrupt under the Bankruptcy Act.

14. That bankruptcy be proceeded with pursuant to the provisions of said Act.

15. That the order of this court heretofore made and entered the 14th day of September, 1967, and amended the 19th day of September, 1967, be, and the same hereby is vacated, without prejudice to further action on the part of the Referee as to other assets.

16. That the matter be referred to the Referee in Bankruptcy for such further action as is appropriate.

DATED at Salt Lake City, in said district, this 4th day of December, 1967.

s/ A. Sherman Christensen
DISTRICT JUDGE

The foregoing order is approved as to form:
(After hearing upon notice of settlement of form, approved without signature of debtor ..... 12-4-67)

.....
John Elwood Dennett, Debtor

s/ John G. Marshall
.....
Attorney for A. P. Nielson

s/ Alvin I. Smith
.....
State Court Receiver